



SIDLEY AUSTIN LLP
1501 K STREET, N.W.
WASHINGTON, D.C. 20005
+1 312 853 7346
+1 312 853 7036 FAX

AMERICA • ASIA PACIFIC • EUROPE

BMCALLENAN@SIDLEY.COM
+1 312 853 7346

October 18, 2019

Via ECFS

Marlene H. Dortch
Secretary
Federal Communications
Commission 445 12th Street, S.W.
Washington, DC 20554

Re: *AT&T Services, Inc. and AT&T Corp. v. 123.Net*
Proceeding No. 19-222, Bureau ID No. EB-19-MD-007

Dear Ms. Dortch:

AT&T Services, Inc. (on behalf of itself and its operating affiliates) and AT&T Corp. (together, "AT&T") submits its Reply to the Answer of 123.Net (d/b/a Local Exchange Carriers of Michigan and/or Prime Circuits) ("LEC-MI"). Consistent with the Commission's rules (47 C.F.R. §§ 1.728, 1.734), this Reply is being filed via ECFS. A copy of this Reply is being served on counsel for LEC-MI. Electronic courtesy copies are also being provided to the Commissions' Enforcement Bureau.

Please contact me if you have any questions regarding this submission.

Sincerely,

/s/ Brian A. McAleenan
Brian A. McAleenan
Counsel for AT&T

cc: Joseph P. Bowser
Adam Suppes
Lisa Saks
Sandra Gray-Fields

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

**AT&T Services, Inc.
1120 20th Street, N.W.
Washington, D.C. 20036
202-457-3090**

**AT&T Corp.
One AT&T Way
Bedminster, NJ 07921
202-457-3090**

Complainant,

v.

**123.Net (d/b/a Local Exchange Carriers of
Michigan and/or Prime Circuits)
24700 Northwestern Highway, Suite 700
Southfield, MI 48075**

Defendant.

**Proceeding Number EB 19-222
File No. EB-19-MD-007
Inf. Compl. File No. EB-14-MDIC-0003**

**AT&T'S REPLY TO THE ANSWER, RESPONSE TO AFFIRMATIVE DEFENSES,
AND INFORMATION DESIGNATIONS**

Pursuant to Section 1.728 of the Rules of the Federal Communications Commission ("Commission"), 47 C.F.R. § 1.728, set forth below are the specific replies of AT&T Services Inc. and AT&T Corp. ("AT&T") to the numbered paragraphs set forth in the Answer of Defendant 123.Net d/b/a Local Exchange Carriers of Michigan ("LEC-MI") to the Formal Complaint of AT&T Services Inc. ("Answer"). AT&T denies any claims or allegations that are not specifically addressed.

1. Paragraph 1 of the Answer does not contain factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied.

2. AT&T admits that it filed informal complaints against LEC-MI and two other local exchange carriers (“LECs”) that alleged improper billing practices. AT&T denies and disagrees with LEC-MI’s argument that LEC-MI did not improperly bill AT&T for access services. AT&T further denies that LEC-MI did not have knowledge or provide consent for Westphalia Telephone Company’s (“Westphalia” or “WTC”) improper billing, a completely unsubstantiated claim that should be given no weight, as further explained in the Legal Analysis section of AT&T’s Formal Complaint (“Legal Analysis”) and Reply Legal Analysis. *See, e.g.*, Legal Analysis at ¶¶ 45-59; Reply Legal Analysis at Section II. The remainder of Paragraph 2 of the Answer does not contain factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied.

3. AT&T denies and disagrees with LEC-MI’s argument that LEC-MI did not improperly bill AT&T for access services. AT&T further denies that LEC-MI did not have knowledge or provide consent for Westphalia’s improper billing, a completely unsubstantiated claim that should be given no weight, as further explained in the Legal Analysis and Reply Legal Analysis. *See, e.g.*, Legal Analysis at ¶¶ 45-59; Reply Legal Analysis at Section II. AT&T denies that LEC-MI did not admit to its liability for the refunds due AT&T for all of the reasons explained in the Complaint, Legal Analysis and Reply Legal Analysis. The remainder of Paragraph 3 of the Answer does not contain factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied.

4. AT&T agrees that LEC-MI has not directly issued any credits or refunds to AT&T and that the parties engaged in settlement efforts, including Staff-supervised mediation. AT&T denies that it obtained any consideration from GLC and Westphalia for the end office charges owed by LEC-MI and denies that LEC-MI lacks knowledge regarding these issues. AT&T denies

that the Joint Declaration is not complete or accurate. AT&T denies that the referenced settlement resolved this dispute because, *inter alia*, the relevant release specifically preserved AT&T's claims against LEC-MI and the settlement only addressed tandem and transport charges billed by GLC and Westphalia, not end office charges. See Formal Complaint ¶ 5, n.5. The remainder of Paragraph 4 of the Answer does not contain factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied.

5. AT&T denies that LEC-MI did not have knowledge or provide consent for Westphalia's improper billing, a completely unsubstantiated claim that should be given no weight, as further explained in the Legal Analysis and Reply Legal Analysis. See, e.g., Legal Analysis at ¶¶ 45-59; Reply Legal Analysis at Section II. The remainder of Paragraph 5 of the Answer does not contain factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied.

6. Paragraph 6 of the Answer does not contain factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied.

7. AT&T denies that its Complaint is defective for the reasons explained in the Formal Complaint, Legal Analysis and Reply Legal Analysis. AT&T denies that its Complaint does not allege facts that constitute a violation of the Communications Act. The remainder of Paragraph 7 of the Answer does not contain factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied.

8. Paragraph 8 of the Answer does not contain factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied.

9. Paragraph 9 of the Answer does not contain factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied.

10. As mentioned above, AT&T agrees that the parties engaged in settlement efforts, including Staff-supervised mediation. The remainder of Paragraph 10 of the Answer does not contain factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied.

11. Because in Paragraph 11 of the Answer LEC-MI admits the allegations of Paragraph 11 of the Formal Complaint, no response is required.

12. AT&T denies and disagrees with LEC-MI's argument that LEC-MI did not improperly bill AT&T for access services. AT&T further denies that LEC-MI did not have knowledge or provide consent for Westphalia's improper billing, a completely unsubstantiated claim that should be given no weight, as further explained in the Legal Analysis and Reply Legal Analysis. *See, e.g.*, Legal Analysis ¶¶ 45-59; Reply Legal Analysis at Section II. AT&T agrees that LEC-MI has failed to issue any credits or refunds to AT&T. The remainder of Paragraph 12 of the Answer does not contain factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied.

13. AT&T denies that its claims are time-barred for the reasons explained in the Formal Complaint and Reply Legal Analysis. *See, e.g.*, Formal Complaint ¶¶ 45-59; Reply Legal Analysis at Section II. The remainder of Paragraph 13 of the Answer does not contain factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied.

14. Paragraph 14 of the Answer does not contain factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied.

15. AT&T denies that its claims have been foreclosed by the referenced release granted to Westphalia and Great Lakes Comnet ("GLC") because, *inter alia*, the relevant release

specifically preserved AT&T's claims against AT&T and the settlement only addressed tandem and transport charges billed by GLC and Westphalia, not end office charges. *See* Formal Complaint ¶ 5, n.5. AT&T agrees that its Formal Complaint is based on a number of the same facts as the *Great Lakes Comnet Order*. The remainder of Paragraph 15 of the Answer does not contain factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied.

16. Paragraph 16 of the Answer does not contain factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied.

17. Paragraph 17 of the Answer does not contain factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied.

18. Paragraph 18 of the Answer does not contain factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied.

19. AT&T agrees that GLC and Westphalia operated as a CLEC and ILEC and that they provided AT&T with access services. AT&T agrees that Westphalia performed certain billing functions but denies that Westphalia was not LEC-MI's billing agent, and denies that LEC-MI is not liable for Westphalia's or GLC's actions. The remainder of Paragraph 19 of the Answer does not contain factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied.

20. Paragraph 20 of the Answer does not contain factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied.

21. AT&T denies that the cited excerpts are not a complete recitation of applicable law. The remainder of Paragraph 21 of the Answer does not contain factual allegations or legal

arguments to which a response is required. If it does, however, those allegations or arguments are denied.

22. AT&T denies that the cited excerpts are not a complete recitation of applicable law. The remainder of Paragraph 22 of the Answer does not contain factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied.

23. AT&T denies that the cited authority does not address “this scenario directly” or that LEC-MI is not liable for the refunds due AT&T for the reasons explained in the Formal Complaint, Legal Analysis and Reply Legal Analysis. AT&T denies that the cited excerpts are not a complete recitation of applicable law. The remainder of Paragraph 23 of the Answer does not contain factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied.

24. AT&T denies the allegation in the second sentence of Paragraph 24 of the Answer that AT&T’s Complaint mischaracterizes the Commission’s rules. AT&T denies that cited excerpts are not a complete recitation of applicable law. The remainder of Paragraph 24 of the Answer does not contain factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied.

25. AT&T agrees that the 8YY traffic at issue is the same as that at issue in the GLC Order. AT&T denies LEC-MI’s characterization of the GLC Joint Statement. The remainder of Paragraph 25 of the Answer does not contain factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied.

26. AT&T denies that LEC-MI does not have direct knowledge of the source of each call. AT&T agrees that all of the traffic could be originated by customers of wireless services.

See Reply Legal Analysis at Section IV. The remainder of Paragraph 26 of the Answer does not contain factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied.

27. Because in Paragraph 27 of the Answer LEC-MI admits the allegations of Paragraph 27 of the Formal Complaint, no response is required.

28. Because in Paragraph 28 of the Answer LEC-MI admits the allegations of Paragraph 28 of the Formal Complaint, no response is required.

29. AT&T denies and disagrees with LEC-MI's argument that LEC-MI did not improperly bill AT&T for access services. AT&T further denies that LEC-MI did not have knowledge or provide consent for Westphalia's improper billing, a completely unsubstantiated claim that should be given no weight, as further explained in the Legal Analysis and Reply Legal Analysis. *See, e.g.*, Legal Analysis ¶¶ 45-59; Reply Legal Analysis at Section II. The remainder of Paragraph 29 of the Answer does not contain factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied.

30. Because in Paragraph 30 of the Answer LEC-MI admits the allegations of Paragraph 30 of the Formal Complaint, no response is required.

31. AT&T agrees that GLC and Westphalia provide certain switched access services to AT&T but denies that Westphalia acted "unilaterally" in how it billed AT&T charges under LEC-MI's tariff. The remainder of Paragraph 31 of the Answer does not contain factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied.

32. Because in Paragraph 32 of the Answer LEC-MI admits the allegations of Paragraph 32 of the Formal Complaint, no response is required.

33. Because in Paragraph 33 of the Answer LEC-MI admits the allegations of Paragraph 33 of the Formal Complaint, no response is required.

34. AT&T agrees that Westphalia billed end office charges but denies that Westphalia acted “unilaterally” in how it billed AT&T charges under LEC-MI’s tariff or that Westphalia did not act as LEC-MI’s billing agent, and denies that LEC-MI is not liable for Westphalia’s or GLC’s actions. AT&T denies that LEC-MI did not bill AT&T and did not have knowledge of its agent Westphalia’s billing or that it lacked authority over such billing for all of the reasons explained in the Complaint, Legal Analysis and Reply Legal Analysis. *See, e.g.*, Legal Analysis ¶¶ 45-59. The remainder of Paragraph 34 of the Answer does not contain factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied.

35. AT&T agrees that the volume of toll-free traffic increased between 2010 and 2012. AT&T denies that LEC-MI did not bill and/or was not responsible for charges billed to AT&T for those access charges for all of the reasons explained in the Formal Complaint, Legal Analysis and Reply Legal Analysis. *See, e.g.*, Legal Analysis ¶¶ 45-59. The remainder of Paragraph 35 of the Answer does not contain factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied.

36. AT&T denies that LEC-MI did not bill and/or was not responsible for charges billed to AT&T for all of the reasons explained in the Formal Complaint, Legal Analysis and Reply Legal Analysis. *See, e.g.*, Legal Analysis ¶¶ 45-59. AT&T denies that LEC-MI cannot access the relevant billing information. AT&T denies that it knew or should have known the true nature of the traffic, which was hidden from AT&T, for the reasons stated in the Reply Legal Analysis. The remainder of Paragraph 36 of the Answer does not contain factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied.

37. AT&T denies the second sentence of Paragraph 37 of the Answer and the quotations from the Commission's *Great Lakes Comnet Order* cited in Paragraph 37 of the Complaint speak for themselves. AT&T denies that the traffic at issue was not disguised and reiterates its position concerning AT&T's knowledge from the preceding Paragraph 36, as it is fully set forth, here. AT&T denies that it has incorrectly characterized quotations from the Commission's order. The remainder of Paragraph 37 of the Answer does not contain factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied.

38. AT&T denies that LEC-MI did not have responsibility for the referenced charges. AT&T agrees that it sent a letter on March 20, 2013. AT&T incorporates its position concerning its knowledge from the preceding two paragraphs, as it is fully set forth, here. The remainder of Paragraph 38 of the Answer does not contain factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied.

39. AT&T denies that the traffic at issue was not disguised, denies that its payments to Westphalia were not payments to LEC-MI and denies that it knew or should have known the true nature of the traffic, which was hidden from AT&T, for the reasons stated in the Reply Legal Analysis. AT&T denies that LEC-MI was not in a position to disclose to AT&T or that it did not have access to the relevant records. The remainder of Paragraph 39 of the Answer does not contain factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied.

40. AT&T incorporates here its responses to the preceding four paragraphs. AT&T denies the third sentence of Paragraph 40 of the Answer that LEC-MI did not bill and/or was not responsible for charges billed to AT&T for all of the reasons explained in the Formal Complaint

and Reply Legal Analysis. *See, e.g.*, Legal Analysis ¶¶ 45-59. To the extent Paragraph 40 contains additional factual allegations or legal arguments to which a response is required, those allegations or arguments are denied.

41. AT&T denies that LEC-MI did not bill and/or was not responsible for charges billed to AT&T or that the payments to Westphalia were not payments to LEC-MI for all of the reasons explained in the Formal Complaint, Legal Analysis and Reply Legal Analysis. *See, e.g.*, Legal Analysis ¶¶ 45-59. To the extent Paragraph 41 of the Answer contains additional factual allegations or legal arguments to which a response is required, those allegations or arguments are denied.

42. AT&T denies the third sentence in Paragraph 42 of the Answer that LEC-MI did not bill and/or was not responsible for charges billed to AT&T or that it has not admitted to such billing. AT&T admits that Westphalia erroneously billed AT&T, as described in the second sentence of Paragraph 42, but AT&T denies and disagrees with LEC-MI's argument that LEC-MI did not improperly bill AT&T for access services or is not liable for that improper billing. AT&T further denies that LEC-MI did not have knowledge or provide consent for Westphalia's improper billing, a completely unsubstantiated claim that should be given no weight, as further explained in the Legal Analysis and Reply Legal Analysis. *See, e.g.*, Legal Analysis ¶¶ 45-59; Reply Legal Analysis at Section II. AT&T denies that it "admitted" any of the calls at issue were "VoIP originated"; AT&T only noted the possibility that some calls might have been VoIP. AT&T further denies there is any evidence that any of the calls were VoIP-PSTN traffic, for which the Commission has particular rules regarding access charges, as opposed to "VoIP in the middle" traffic, which is treated the same as ordinary traffic. The remainder of Paragraph 42 of the Answer

does not contain factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied.

43. AT&T denies that the allegations in Paragraph 43 of its Complaint do not relate to LEC-MI because GLC and Westphalia were acting as agents for LEC-MI. The remainder of Paragraph 43 of the Answer does not contain factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied.

44. AT&T agrees that LEC-MI did not contest that Westphalia's billing was improper but denies that LEC-MI contested its own liability. The remainder of Paragraph 44 of the Answer does not contain factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied.

45. AT&T denies the allegation in the third sentence of Paragraph 45 of the Answer that the cited sections of the Communications Act are not a complete recitation of applicable law. The remainder of Paragraph 45 of the Answer does not contain factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied.

46. AT&T denies the third sentence of Paragraph 46 of the Answer because LEC-MI improperly billed AT&T and/or had agency over the billing and other activities of Westphalia. AT&T denies and disagrees with LEC-MI's argument that LEC-MI did not improperly bill AT&T for access services. AT&T further denies that LEC-MI did not have knowledge or provide consent for Westphalia's improper billing, a completely unsubstantiated claim that should be given no weight, as further explained in the Legal Analysis and Reply Legal Analysis. *See, e.g.*, Legal Analysis ¶¶ 45-59; Reply Legal Analysis at Section II. The remainder of Paragraph 46 of the

Answer does not contain factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied.

47. AT&T denies that the cited excerpt of the *Eighth Report & Order* is not a complete and accurate recitation of applicable law. AT&T denies the third sentence of Paragraph 47 of the Answer that LEC-MI did not impose, bill, or become liable for Westphalia's actions for all of the reasons explained in the Complaint, Legal Analysis and Reply Legal Analysis. *See, e.g.*, Legal Analysis ¶¶ 45-59. AT&T denies the fourth sentence of Paragraph 47 regarding LEC-MI's knowledge or consent of Westphalia's actions, a completely unsubstantiated claim that should be given no weight, as further explained in the Legal Analysis and Reply Legal Analysis. *See, e.g.*, Legal Analysis ¶¶ 45-59; Reply Legal Analysis at Section II. The remainder of Paragraph 47 of the Answer does not contain factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied.

48. AT&T denies the allegation in the first sentence of Paragraph 48 of the Answer that the excerpt of the *Northern Valley Order* is not a complete recitation of the relevant portions of order. AT&T denies the third sentence of Paragraph 48 because LEC-MI billed and/or was responsible for the billing of the charges in dispute. AT&T denies the fourth sentence of Paragraph 48 regarding LEC-MI's knowledge or consent, a completely unsubstantiated claim that should be given no weight, as further explained in the Legal Analysis and Reply Legal Analysis. *See, e.g.*, Legal Analysis ¶¶ 45-59; Reply Legal Analysis at Section II. The remainder of Paragraph 48 of the Answer does not contain factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied.

49. AT&T denies the second sentence of Paragraph 49 of the Answer because LEC-MI billed and/or had responsibility for charges billed to AT&T for all of the reasons explained in the

Complaint, Legal Analysis and Reply Legal Analysis. *See, e.g.*, Legal Analysis at ¶¶ 45-59. AT&T denies the third sentence of Paragraph 49 regarding LEC-MI's knowledge or control of Westphalia's improper billing, a completely unsubstantiated claim that should be given no weight, as further explained in the Legal Analysis and Reply Legal Analysis. *See, e.g.*, Legal Analysis ¶¶ 45-59; Reply Legal Analysis at Section II. The remainder of Paragraph 49 of the Answer does not contain factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied.

50. AT&T denies the second sentence of Paragraph 50 of the Answer because LEC-MI billed and/or was responsible for charges billed to AT&T for all of the reasons explained in the Complaint, Legal Analysis and Reply Legal Analysis. *See, e.g.*, Legal Analysis ¶¶ 45-59. AT&T denies the third sentence of Paragraph 50 regarding LEC-MI's knowledge or consent over Westphalia's improper billing, a completely unsubstantiated claim that should be given no weight, as further explained in the Legal Analysis and Reply Legal Analysis. *See, e.g.*, Legal Analysis ¶¶ 45-59; Reply Legal Analysis at Section II. AT&T denies that it is estopped from accurately describing GLC's tariff. The remainder of Paragraph 50 of the Answer does not contain factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied.

51. AT&T denies the argument in the second sentence of Paragraph 51 of the Answer that it is estopped from accurately describing GLC's tariff. The remainder of Paragraph 51 of the Answer does not contain factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied.

52. AT&T agrees that the tariff cited speaks for itself. AT&T denies the allegation in the second sentence of Paragraph 52 of the Complaint that regarding why AT&T did or did not

dispute certain charges. AT&T denies that it is estopped from accurately describing GLC's tariff. The remainder of Paragraph 52 of the Answer does not contain factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied.

53. AT&T denies the argument in the second sentence of Paragraph 53 of the Answer that its analysis of damages is not conservative, credible, or reasonably certain. The remainder of Paragraph 53 of the Answer does not contain factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied

54. AT&T denies the claim in the first sentence of Paragraph 54 of the Answer that LEC-MI was not involved in 8YY aggregation activities because, *inter alia*, LEC-MI provided the facilities that carried the aggregated traffic (for which it received compensation), but AT&T agrees that GLC and Westphalia also engaged in the alleged 8YY aggregation. AT&T denies that LEC-MI does not have sufficient knowledge and information to form a view as to the accuracy of AT&T's analysis of the traffic volumes. AT&T agrees that LEC-MI has provided AT&T certain data relating to the traffic at issue. The remainder of Paragraph 54 of the Answer does not contain factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied.

55. AT&T denies that LEC-MI does not have sufficient knowledge and information to form a view as to the accuracy of AT&T's analysis of the traffic volumes. AT&T denies that LEC-MI had no knowledge or consent of the actions of Westphalia, its agent, a completely unsubstantiated claim that should be given no weight, as further explained in the Legal Analysis and Reply Legal Analysis. *See, e.g.*, Legal Analysis ¶¶ 45-59; Reply Legal Analysis at Section II. AT&T denies that LEC-MI did not have an 8YY aggregation scheme or that the traffic at issue did

not begin in February 2012. The remainder of Paragraph 55 of the Answer does not contain factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied.

56. AT&T denies the claim in the second sentence of Paragraph 56 of the Answer that LEC-MI did not overcharge AT&T. AT&T also denies LEC-MI's claim regarding its own actions in the calculation of the overcharge. AT&T agrees that LEC-MI provided volume data for two separate trunk groups. AT&T denies that LEC-MI had no knowledge or consent of the actions of Westphalia, its agent, a completely unsubstantiated claim that should be given no weight, as further explained in the Legal Analysis and Reply Legal Analysis. *See, e.g.*, Legal Analysis ¶¶ 45-59; Reply Legal Analysis at Section II. AT&T denies that it was underbilled by LEC-MI, an unexplained counterfactual to the entire proceeding. AT&T denies the claim that it is not entitled to a recovery from LEC-MI. The remainder of Paragraph 56 of the Answer does not contain factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied.

57. AT&T denies that LEC-MI had no knowledge or consent of the actions of Westphalia, its agent, a completely unsubstantiated claim that should be given no weight, as further explained in the Legal Analysis and Reply Legal Analysis. *See, e.g.*, Legal Analysis ¶¶ 45-59; Reply Legal Analysis at Section II. AT&T denies the claim that it is not entitled to a recovery from LEC-MI. The remainder of Paragraph 57 of the Answer does not contain factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied.

58. Paragraph 58 of the Answer does not contain any factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied.

59. AT&T denies that the excerpted sections of the Communications Act are not a proper recitation of the applicable law. AT&T further denies that the excerpted sections of the GLC Order are not a complete recitation of the order. AT&T denies that LEC-MI did not bill and/or was not responsible for charges billed to AT&T for all of the reasons explained in the Formal Complaint, Legal Analysis and Reply Legal Analysis. *See, e.g.*, Legal Analysis ¶¶ 45-59. AT&T denies that LEC-MI had no knowledge or consent of the actions of Westphalia, its agent, a completely unsubstantiated claim that should be given no weight, as further explained in the Legal Analysis and Reply Legal Analysis. *See, e.g.*, Legal Analysis ¶¶ 45-59; Reply Legal Analysis at Section II. AT&T denies that LEC-MI was not responsible for reasonable diligence of Westphalia's actions, as its agent. AT&T denies that the billing was not disguised or that AT&T should have understood the nature of the disguised traffic. The remainder of Paragraph 59 of the Answer does not contain factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied.

COUNT I

60. AT&T incorporates each of its responses to Paragraphs 1-59 of its Reply to the Answer to the extent and in the same way stated therein.

61. AT&T denies that the excerpted provision of the Communications Act is not a complete recitation of applicable law. The remainder of Paragraph 61 of the Answer does not contain factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied.

62. AT&T denies that the excerpted provision of the Communications Act is not a complete recitation of applicable law. The remainder of Paragraph 62 of the Answer does not contain factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied.

63. AT&T denies that LEC-MI did not bill and/or is not responsible for charges billed to AT&T. AT&T denies that LEC-MI had no knowledge or consent of the actions of Westphalia, its agent, a completely unsubstantiated claim that should be given no weight, as further explained in the Legal Analysis and Reply Legal Analysis. *See, e.g.*, Legal Analysis ¶¶ 45-59; Reply Legal Analysis at Section II. The remainder of Paragraph 63 of the Answer does not contain factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied.

64. AT&T denies that LEC-MI is not liable or that it did not violate the Communications Act. AT&T denies that LEC-MI had no knowledge or consent of the actions of Westphalia, its agent a completely unsubstantiated claim that should be given no weight, as further explained in the Legal Analysis and Reply Legal Analysis. *See, e.g.*, Legal Analysis ¶¶ 45-59; Reply Legal Analysis at Section II. The remainder of Paragraph 64 of the Answer does not contain factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied.

65. AT&T denies that LEC-MI did not violate the Act and is not entitled to recovery. The remainder of Paragraph 65 of the Answer does not contain factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied.

COUNT II

66. AT&T incorporates each of its responses to Paragraphs 1-59 of its Reply to the Answer to the extent and in the same way stated therein.

67. AT&T denies that the cited excerpt of the Communications Act is not a complete recitation of applicable law. The remainder of Paragraph 67 of the Answer does not contain factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied.

68. AT&T denies that LEC-MI did not violate the Communications Act. The remainder of Paragraph 68 of the Answer does not contain factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied.

69. AT&T admits that the end users of wireless carriers are not the end users of LEC-MI. AT&T denies that LEC-MI does not have sufficient knowledge or information regarding the remaining allegations in Paragraph 69 of the Complaint, as claimed in the second sentence of Paragraph 69 of the Answer. The remainder of Paragraph 69 of the Answer does not contain factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied.

70. AT&T denies that that LEC-MI does not have sufficient knowledge or information regarding the remaining allegations in Paragraph 70 of the Complaint, as claimed in the second sentence of Paragraph 70 of the Answer. AT&T denies that LEC-MI did not have knowledge or provide consent of the actions of Westphalia, its agent, a completely unsubstantiated claim that should be given no weight, as further explained in the Legal Analysis and Reply Legal Analysis. *See, e.g.*, Legal Analysis ¶¶ 45-59; Reply Legal Analysis at Section II. To the extent that Paragraph

70 contains any additional factual allegations or legal arguments that require a response, they are denied.

71. Paragraph 71 of the Answer contains no factual allegations or legal arguments that require a response. To the extent they do require a response, they are denied.

72. AT&T denies that LEC-MI did not bill and/or was not responsible for charges billed to AT&T for all of the reasons explained in the Complaint, Legal Analysis and Reply Legal Analysis. *See, e.g.*, Legal Analysis ¶¶ 45-59. AT&T denies that LEC-MI did not have knowledge or provide consent of the actions of Westphalia, its agent, a completely unsubstantiated claim that should be given no weight, as further explained in the Legal Analysis and Reply Legal Analysis. *See, e.g.*, Legal Analysis ¶¶ 45-59; Reply Legal Analysis at Section II. The remainder of Paragraph 72 of the Answer does not contain factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied.

73. AT&T denies that LEC-MI did not violate the Communications Act, that it did not bill and/or is not responsible for charges billed to AT&T and that it does not owe AT&T a refund for its actions and/or the actions of its agents for all of the reasons explained in the Complaint, Legal Analysis and Reply Legal Analysis. *See, e.g.*, Legal Analysis ¶¶ 53-59.

PRAYER FOR RELIEF

74. AT&T denies that it is not entitled to relief for the reasons explained in its Complaint, Legal Analysis and Reply Legal Analysis.

AT&T LEGAL ANALYSIS

75. AT&T denies that this dispute is limited to the specific charges stated in Paragraph 75 of the Answer. AT&T further denies that it was or should have been on notice of LEC-MI's improper billing practices in violations of its tariff and the Communications Act until July 2013.

AT&T denies that it is not entitled to compensation for LEC-MI's actions. AT&T admits that it received compensation via settlement with GLC and Westphalia but denies that the settlement covered LEC-MI's improper billing or otherwise relieved LEC-MI of any liability because, *inter alia*, the relevant release specifically preserved AT&T's claims against LEC-MI and the settlement addressed tandem and transport charges billed by GLC and Westphalia, not end office charges. See Formal Complaint ¶ 5, n.5; Reply Legal Analysis at Section II. The remainder of Paragraph 75 of the Answer does not contain factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied.

76. AT&T agrees that Westphalia should not have improperly billed AT&T. AT&T denies that LEC-MI does not have liability for the improper billing for all of the reasons explained in the Complaint, Legal Analysis and Reply Legal Analysis. See, e.g., Legal Analysis ¶¶ 53-59. The remainder of Paragraph 76 of the Answer does not contain factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied.

77. AT&T agrees that Westphalia should not have improperly billed AT&T. AT&T denies that LEC-MI does not have liability for the improper billing for all of the reasons explained in the Formal Complaint, Legal Analysis and Reply Legal Analysis. See, e.g., Legal Analysis ¶¶ 53-59. The remainder of Paragraph 77 of the Answer does not contain factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied.

78. Paragraph 78 of the Answer does not contain factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied.

79. AT&T denies that LEC-MI did not bill and/or was not responsible for charges billed to AT&T and did not violate the Communications Act. AT&T denies LEC-MI's characterization of the legal proposition in Paragraph 79 of the Complaint. The remainder of Paragraph 79 of the Answer does not contain factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied.

80. Paragraph 80 of the Answer does not contain factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied.

81. Paragraph 81 of the Answer does not contain factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied.

82. Paragraph 82 of the Answer does not contain factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied.

83. Paragraph 83 of the Answer does not contain factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied.

84. AT&T denies that LEC-MI did not bill and/or was not responsible for charges billed to AT&T for all of the reasons explained in the Formal Complaint, Legal Analysis and Reply Legal Analysis. *See, e.g.,* Legal Analysis ¶¶ 45-59. The remainder of Paragraph 84 of the Answer does not contain factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied.

85. AT&T denies that LEC-MI did not bill and/or was not responsible for charges billed to AT&T for all of the reasons explained in the Complaint, Legal Analysis and Reply Legal Analysis. *See, e.g.,* Legal Analysis ¶¶ 45-59. The remainder of Paragraph 85 of the Answer does not contain factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied.

86. AT&T denies that LEC-MI did not bill and/or was not responsible for charges billed to AT&T for all of the reasons explained in the Complaint, Legal Analysis and Reply Legal Analysis. *See, e.g.*, Legal Analysis ¶¶ 45-59. The remainder of Paragraph 86 of the Answer does not contain factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied.

87. AT&T denies that LEC-MI did not bill and/or was not responsible for charges billed to AT&T for all of the reasons explained in the Complaint, Legal Analysis and Reply Legal Analysis. *See, e.g.*, Legal Analysis ¶¶ 45-59. The remainder of Paragraph 87 of the Answer does not contain factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied.

88. AT&T denies that LEC-MI did not bill and/or was not responsible for charges billed to AT&T for all of the reasons explained in the Formal Complaint, Legal Analysis and Reply Legal Analysis. *See, e.g.*, Legal Analysis ¶¶ 45-59. The remainder of Paragraph 88 of the Answer does not contain factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied.

89. AT&T denies that LEC-MI did not bill and/or was not responsible for charges billed to AT&T for all of the reasons explained in the Complaint, Legal Analysis and Reply Legal Analysis. *See, e.g.*, Legal Analysis ¶¶ 45-59. AT&T denies that it is estopped from accurately describing GLC's tariff. The remainder of Paragraph 89 of the Answer does not contain factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied.

90. AT&T denies that LEC-MI did not bill and/or was not responsible for charges billed to AT&T and did not violate the Communications Act. AT&T further denies that it is not entitled

to recovery from LEC-MI. The remainder of Paragraph 90 of the Answer does not contain factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied.

91. AT&T denies that Westphalia was not LEC-MI's agent. AT&T denies that Michigan law governs the agency and tort issues raised in the dispute and had only noted in footnote 50 to Paragraph 91 of the Complaint that AT&T "assumes" for the sake of argument that Michigan law governed certain aspects of agency. *See* Reply Legal Analysis at Section I. The remainder of Paragraph 91 of the Answer does not contain factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied.

92. Paragraph 92 of the Answer does not contain factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied.

93. Paragraph 93 of the Answer does not contain factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied.

94. AT&T denies that the claims are based "solely" on Westphalia's apparent authority. AT&T denies that LEC-MI is not liable for the actions of Westphalia, and denies that Westphalia did not have authority (actual and apparent) for its billing. The remainder of Paragraph 94 of the Answer does not contain factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied.

95. AT&T denies that LEC-MI does not have liability or that Westphalia did not have authority (actual and apparent) for its billing for all of the reasons explained in the Formal Complaint, Legal Analysis and Reply Legal Analysis. *See, e.g.,* Legal Analysis ¶¶ 53-59. The remainder of Paragraph 95 of the Answer does not contain factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied.

96. AT&T denies that LEC-MI does not have liability or that Westphalia did not have authority (actual and apparent) for its billing for all of the reasons explained in the Complaint, Legal Analysis and Reply Legal Analysis. *See, e.g.*, Legal Analysis ¶¶ 53-59. The remainder of Paragraph 96 of the Answer does not contain factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied.

97. AT&T denies that LEC-MI does not have liability or that Westphalia did not have authority (actual and apparent) for its billing for all of the reasons explained in the Complaint, Legal Analysis and Reply Legal Analysis. *See, e.g.*, Legal Analysis ¶¶ 53-59. The remainder of Paragraph 97 of the Answer does not contain factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied.

98. AT&T denies that LEC-MI does not have liability or that Westphalia did not have authority (actual and apparent) for its billing. AT&T denies that it is not entitled to recovery from LEC-MI. The remainder of Paragraph 98 of the Answer does not contain factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied.

99. AT&T denies that LEC-MI does not have liability or that Westphalia did not have authority (actual and apparent) for its billing for all of the reasons explained in the Complaint, Legal Analysis, and Reply Legal Analysis. *See, e.g.*, Legal Analysis ¶¶ 53-59. AT&T denies that it had or should have had knowledge of the improper billing or that Westphalia lacked authority (actual and apparent), which is not the case. The remainder of Paragraph 99 of the Answer does not contain factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied.

100. AT&T denies that LEC-MI does not have liability or that Westphalia did not have authority (actual and apparent) for its billing for all of the reasons explained in the Complaint, Legal Analysis, and Reply Legal Analysis. *See, e.g.*, Legal Analysis ¶¶ 53-59. The remainder of Paragraph 100 of the Answer does not contain factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied.

101. AT&T denies that LEC-MI does not have liability or that Westphalia did not have authority (actual and apparent) for its billing for all of the reasons explained in the Complaint, Legal Analysis, and Reply Legal Analysis. *See, e.g.*, Legal Analysis ¶¶ 53-59. AT&T denies that it is not entitled to recovery from LEC-MI. The remainder of Paragraph 101 of the Answer does not contain factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied.

AT&T'S RESPONSES TO AFFIRMATIVE DEFENSES

A. Failure to State a Claim.

AT&T denies that its Complaint fails to state a claim upon which relief can be granted because AT&T alleges facts that, if true, establish that Defendant violated the Communications Act. *See* Formal Complaint ¶¶ 1-5; 77-90. Under Section 208 of the Communications Act, any person may bring a complaint at the Commission for a common carrier's violation of the Act. 47 U.S.C. § 208. LEC-MI is a common carrier. Answer ¶ 7. AT&T's Complaint alleges that Defendant violated Sections 201(b) and 203(c) of the Act. *See, e.g.*, Formal Complaint ¶¶ 77-90. In particular, AT&T alleges facts that, if true, establish that Defendant violated various rules and orders of the Commission, that these rules and orders lawfully implement Sections 201(b) and 203(c), and that LEC-MI's violation of these rules and orders therefore violate the Act. *Id.*

AT&T denies that its settlement agreement with GLC and Westphalia forecloses it from

recovering from LEC-MI or that Michigan law dictates the outcome here because, *inter alia*, the release expressly preserved AT&T's claims against LEC-MI, federal common law governs the interpretation of the scope of a release of federal statutory claims, and the settlement addressed tandem and transport charges billed by GLC and Westphalia, not end office charges. *See* Formal Complaint ¶ 5, n.5; Reply Legal Analysis at Section I. AT&T further denies that it knew or had reason to know that Westphalia was assessing improperly charges or that Westphalia did so without authority (actual or apparent) of LEC-MI. *See* Reply Legal Analysis at Section II. AT&T denies that the adverse-interest exception bars its claim. *See id.* at Section III; Formal Complaint ¶ 99. AT&T's Complaint states valid claims for relief. Moreover, LEC-MI fails to adequately explain its affirmative defense. LEC-MI's Answer lists a series of boilerplate affirmative defense, including failure to state a claim, and then cross-references to its Legal Analysis. But, the Legal Analysis does not explain how the boilerplate affirmative defense applies to the instant case. Indeed, the terms of the affirmative defense are not in the Defendant's Legal Analysis or Answer.

B. Statute of Limitations.

AT&T denies that its claims are barred in whole or in part by the statute of limitations. As explained in the Complaint, the Act does contain a two-year statute of limitations on claims for refunds of overcharges, 47 U.S.C. § 415(c), but that does not begin to run until "the cause of action accrues," which does not occur until the plaintiff discovers or should have discovered the overcharge. *See* Formal Complaint ¶ 59. As further explained in the Complaint, the two year statute of limitations did not begin to run until July of 2013. *Id.*; *see also* Reply Legal Analysis at Section V.

C. Failure to Mitigate Damages.

AT&T denies that it failed to mitigate damages. First, AT&T carries large volumes of traffic. Second, as the Commission has recognized, because the Commission has required IXC's to have geographically averaged rates, IXC's cannot pass on to end users the excessive costs when carriers such as LEC-MI overcharge—or caused to be overcharged—AT&T for access. *See CLEC Access Charge Order*, 16 FCC Rcd. 9923, ¶ 31 (2001) (“IXC's are effectively unable [] to pass through access charges.”). Third, AT&T is of course unable to block customers' calls if they result in improper billing. *See Establishing Just and Reasonable Rates for Local Exchange Carriers; Call Blocking by Carriers*, 22 FCC Rcd. 11629, ¶ 1 (2007) (“carriers that contend that access charges of a LEC are unreasonable . . . may not engage in . . . call blocking.”). To the extent LEC-MI alleges AT&T could have mitigated damages by knowing of the improper billing scheme, AT&T has addressed those arguments. *See Reply Legal Analysis* at Section IV.

Moreover, LEC-MI fails to adequately explain its affirmative defense. LEC-MI's Answer lists a series of boilerplate affirmative defense, including failure to mitigate damages, and then cross-references to its Legal Analysis. However, the Legal Analysis does not explain how the boilerplate affirmative defense applies to the instant case. Indeed, other than the unsupported assertion at the conclusion of the Answer, the terms of the affirmative defense are not in the Defendant's Legal Analysis or Answer.

D. Doctrines of Release/Res Judicata.

AT&T denies that the doctrines of release/res judicata absolves LEC-MI from liability because, *inter alia*, the release granted to GLC and Westphalia expressly preserved AT&T's claims against LEC-MI and the settlement resolved improper tandem and transport charges, but

not the disputed end office charges at issue in the instant Complaint. *See* Formal Complaint ¶ 5, n.5. AT&T was improperly billed by LEC-MI for \$1,054,087 in end office access charges on aggregated 8YY traffic and no other defendant or release has or can satisfy that liability. *See* Reply Legal Analysis at Section I.

E. Doctrines of Waiver, Estoppel, Laches and Ratification.

AT&T denies that the doctrines of waiver, estoppel, laches or ratification are a defense to its claims. LEC-MI fails to adequately explain its affirmative defense. LEC-MI's Answer lists a series of boilerplate affirmative defense, including citing the doctrines of waiver, estoppel, laches, and ratification, and then cross-references to its own Legal Analysis. But LEC-MI's Legal Analysis does not explain how the boilerplate affirmative defense applies to the instant case. Indeed, other than the unsupported assertion at the conclusion of the Answer and with the exception of estoppel, the terms of the affirmative defense are not in the Defendant's Legal Analysis or Answer. The Answer does reference AT&T being "estopped from arguing that the GLC tariff does not adequately describe LEC-MI's end office switched access services" in multiple paragraphs. *See, e.g.*, Answer ¶¶ 51, 52. But LEC-MI does not provide any authority for that proposition.

F. Voluntary Payment Doctrine.

AT&T denies that the voluntary payment doctrine is an affirmative defense to its claims. First, the Commission addressed this same point in the related *Great Lakes Comnet Order*, in which the Commission concluded that AT&T did not make voluntary payments because it did not know the rates it was paying when it paid them were inconsistent with the Communications Act and that doctrine could not be harmonized with the Commission's own obligations under the Act or the terms of the tariff. *See* 30 FCC Rcd. 2586, ¶ 30. Second, LEC-MI fails to adequately

explain its affirmative defense. LEC-MI's Answer lists a series of boilerplate affirmative defense, including citing the voluntary payments doctrine, and then cross-references to its Legal Analysis. But the Legal Analysis does not explain how the boilerplate affirmative defense applies to the instant case. Indeed, other than the unsupported assertion at the conclusion of the Answer, the terms of the affirmative defense are not in the Defendant's Legal Analysis or Answer.

AT&T'S INFORMATION DESIGNATION

With respect to Section 1.728(d) of the Commission's Rules, 47 C.F.R. § 1.728(d). AT&T states that it does not have anything to add to the information designation it provided with its Formal Complaint with the exception of the additional document attached as an exhibit to the Reply Legal Analysis.

Respectfully submitted,

Christi Shewman
Gary L. Phillips
David L. Lawson
AT&T SERVICES, INC
1120 20th Street, N.W.
Washington, D.C. 20036
202-457-3090

/s/ Brian A. McAleenan
Michael J. Hunseder
Marc A. Korman
SIDLEY AUSTIN LLP
1501 K Street NW
Washington, DC 20005
mhunseder@sidley.com
(202) 736-8000
(202) 736-8711 (fax)

Brian A. McAleenan
SIDLEY AUSTIN LLP
One South Dearborn
Chicago, IL 60603
bmcaleenan@sidley.com
(312) 853-7000
(312) 853-7036 (fax)

Dated: October 18, 2019

Counsel for AT&T

CERTIFICATE OF SERVICE

I hereby certify that on October 18, 2019, I caused a copy of the foregoing AT&T's Reply to the Answer, Responses to Affirmative Defenses, And Information Designations, as well as the Reply Legal Analysis, to be served as indicated below to the following:

Marlene H. Dortch
Office of the Secretary
Market Disputes and Resolution Division
Federal Communications Commission
445 12th Street SW
Washington, DC 20554
Served via ECFS

Lisa Saks
Katheen Thomas
Sandra Gray-Fields
Adam Supples
Enforcement Bureau
Federal Communications Commission
445 12th Street SW
Washington, DC 20554
Served via ECFS

Joseph Bowser
Roth Jackson Gibbons Condlin P.C.
1519 Summit Ave., Suite 102
Richmond, VA 23219
Counsel for LEC-MI
Served via FedEx by Agreement

Respectfully submitted,

/s/Brian McAleenan
Brian A. McAleenan

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

**In the Matter of
AT&T Services, Inc. and AT&T Corp.,**

Complainants,

v.

**123.Net (d/b/a Local Exchange Carriers of
Michigan and/or Prime Circuits)**

Defendant.

**Proceeding Number 19-222
Bureau ID Number EB-19-MD-007**

REPLY LEGAL ANALYSIS OF AT&T

Christi Shewman
Gary L. Phillips
David L. Lawson
AT&T SERVICES, INC
1120 20th Street, N.W.
Washington, D.C. 20036
202-457-3090

Brian A. McAleenan
SIDLEY AUSTIN LLP
One South Dearborn
Chicago, IL 60603
(312) 853-7000
(312) 853-7036 (fax)

Michael J. Hunseder
Marc A. Korman
SIDLEY AUSTIN LLP
1501 K Street NW
Washington, DC 20005
mhunseder@sidley.com
(202) 736-8000
(202) 736-8711 (fax)

Dated: October 18, 2019

Counsel for AT&T Services, Inc. and AT&T Corp.

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of
AT&T Services, Inc. and AT&T Corp.,

Complainants,

v.
123.Net (d/b/a Local Exchange Carriers of
Michigan and/or Prime Circuits)

Defendant.

Proceeding Number 19-222
Bureau ID Number EB-19-MD-007

REPLY LEGAL ANALYSIS OF AT&T

Pursuant to 47 C.F.R. § 1.728 and the Staff’s Scheduling Order, Complainants AT&T Services Inc. and AT&T Corp. (“AT&T”) hereby respectfully submit this Reply Legal Analysis, which responds to the Answer to the Formal Complaint (“Answer”) and Legal Analysis in Opposition to Formal Complaint (“LEC-MI Legal Analysis”) submitted by Defendant 123.Net d/b/a Local Exchange Carriers of Michigan (“LEC-MI”).

LEC-MI’s Answer and Legal Analysis, which largely consist of misdirection and strawmen arguments attempt to muddy a straightforward case in which it admitted liability at the inception of the proceeding. In its Response to AT&T’s Informal Complaint, LEC-MI admitted that AT&T was “erroneously billed” end office charges that LEC-MI assessed, via a billing agent, under LEC-MI’s switched access tariff. Formal Complaint of AT&T Services, Inc. and AT&T Corp. Against 123.Net (“Formal Complaint”), Ex. 5, Letter of J. Bowser, Counsel to LEC-MI, to A.J. DeLaurentis, FCC at 1 (May 12, 2014) (“LEC-MI Inf. Compl. Resp.”) (ATT-

0000068); *see id.* at 5 (ATT-0000072) (“LEC-MI agrees with AT&T . . . that end office charges should not have been assessed on this traffic”). LEC-MI also said that “it is clear that credits should be issued to AT&T,” *id.*, and that the credits would be issued as soon as the amount of the overcharge became more clear to LEC-MI. *Id.* at 1 (ATT-0000068). More pointedly, Dan Irvin, LEC-MI’s Chief Executive Officer, testified before the Michigan Public Service Commission (“MPSC”) that: (i) LEC-MI “did not provide local switching services to AT&T Corp. on the aggregated 8YY traffic” at issue¹; (ii) he was aware that LEC-MI paid Westphalia Telephone Company (“Westphalia” or “WTC”) and Great Lakes Comnet (“GLC”) to perform the billing of access charges on behalf of LEC-MI and that LEC-MI received at least some of the access charges AT&T paid;² and (iii) AT&T was “entitled” to a refund for any end office charges it paid.³

Based on LEC-MI’s admissions of liability that end office charges were improperly billed and that AT&T was entitled to refunds, AT&T held off on converting to a formal complaint as to LEC-MI while pursuing its complaint against GLC and Westphalia, because AT&T believed (and believes now) that the only remaining issue as to the improperly billed end office charges is one of damages. AT&T made substantial efforts to resolve this dispute without converting its informal complaint, but, despite LEC-MI’s admissions and sworn testimony, LEC-MI failed to follow through on its representations. AT&T has not yet received credits for any of the end office charges LEC-MI concedes were “erroneously billed” under LEC-MI’s access tariff.

¹ Michigan Public Service Commission Formal Complaint Cross Examination Transcript at 545 (Sept. 23, 2014), <https://mi-psc.force.com/sfc/servlet.shepherd/version/download/068t00000001UJqCAAW> (“MPSC Tr.”).

² *Id.* at 527, 545, 559, 574, 579.

³ *Id.* at 545.

Further, in its Formal Complaint, AT&T set forth its calculation of damages, which is conservative and straightforward. Notably, apart from raising a limitations defense and an unsubstantiated claim that some traffic at issue is “VoIP” traffic, LEC-MI does not challenge *any* aspect of AT&T’s damages methodology or calculations. Yet, even though LEC-MI previously said it was “clear” that AT&T was “entitled” to credits once the amount became certain, LEC-MI remains unwilling to issue any credits or pay any refunds.⁴

Based on these undisputed facts, this case is simple and clear-cut: LEC-MI admitted liability years ago, and AT&T’s Formal Complaint establishes that LEC-MI owes AT&T \$1,054,897 in refunds of “erroneously billed” end office charges (plus interest). LEC-MI’s Answer and Legal Analysis ignore virtually all of these critical facts. Indeed, LEC-MI’s liability admissions are never mentioned in either LEC-MI’s Legal Analysis or its expert’s 200-plus page report. Instead, LEC-MI tries to deny the liability it already conceded, offering a scatter-shot array of defenses in an effort to divert the Commission’s attention away from the refunds LEC-MI owes AT&T for the “erroneously billed” end office charges that LEC-MI billed under its access tariff. These defenses all lack merit.

AT&T Did Not Release Its Claims – LEC-MI asserts that AT&T released its claims against LEC-MI when AT&T settled its claims against Westphalia and GLC and granted those two entities a release, even though AT&T’s claims against LEC-MI were expressly excluded from the scope of that release. LEC-MI seeks to invalidate the plain meaning of this explicit exclusion by relying on a tenuous

⁴ LEC-MI previously suggested its refund liability is confined to the end office charge payments it actually received from Westphalia/GLC. However, LEC-MI has not raised such a claim in its Answer, and it is thus waived (but lacks merit in all events). 47 C.F.R. § 1.721(b). Instead, LEC-MI denies that it owes AT&T *any* amounts. There is no merit to LEC-MI’s newly minted “no liability” theories, and as AT&T explained in the Formal Complaint, LEC-MI is liable for all amounts AT&T paid to LEC-MI’s billing agent (regardless of whether LEC-MI received the payments). LEC-MI’s repeated efforts to blame Westphalia and GLC for its predicament are also unavailing. As LEC-MI admitted, LEC-MI could have pursued its own claims against Westphalia/GLC, including for “contribution and/or indemni[fication],” but it did not. Formal Complaint, Ex. 5, LEC-MI Infl. Compl. Resp. at 6 (ATT-0000073).

Michigan state law case that is, at best, an outlier. For several reasons, this case is inapplicable here. First, even on its own terms, the case does not apply to claims arising under contract, like the Section 203 claim AT&T raises here. Further, Michigan law does not apply at all. Federal common law governs whether federal statutory claims are released, and if the law of a single state were to apply, it would be New York law (which governs the interpretation and effect of the settlement). Federal law and New York law both determine the scope of a release by looking to the expressed intent of the parties, which here was to preserve AT&T's claims against LEC-MI.

AT&T's Knowledge Of The Improper Billing Is Irrelevant – LEC-MI contends that Westphalia lacked apparent authority to issue the invoices at issue because AT&T “knew or should have known” that the traffic was improper because of the increase in volumes. The Commission has already rejected similar defenses in *AT&T Servs. Inc., et al. v. Great Lakes Comnet, Inc. et al.*, 30 FCC Rcd. 2586, ¶¶ 36-37 (2015) (“*Great Lakes Comnet Order*”), and in doing so, it stated that the access billing “disguise[d] the nature” of the traffic to customers. *Id.* n.125. Notably, other major IXCs only discovered the overcharges at around the same time as AT&T. Formal Complaint, Ex. 4, Letter to R. McEnery, FCC, from R. Severy, Verizon, A. Sherr, CenturyLink, and K. Buell, Sprint, File No. EB-14-MDIC-0001 (emailed Feb. 26, 2014) (“IXC Informal Complaint”) (ATT-0000049 to ATT-0000066). Further, whether or not AT&T knew about the improper billing has no bearing whatsoever on the issue of Westphalia's apparent authority as LEC-MI's billing agent. Westphalia had authority to issue, and had long issued, access invoices under LEC-MI's tariff to AT&T that AT&T paid, and the improper charges appeared on those invoices. Indeed, Mr. Irvin publicly testified in 2014 that Westphalia and GLC had long acted on LEC-MI's behalf. MPSC Tr. at 527, 559, 574, 579. Any notion that, years earlier, AT&T could or should have concluded both that LEC-MI was unaware of its own end office charges and that Westphalia was acting against LEC-MI's interests in issuing those bills is meritless.

The Adverse Interest Exception Does Not Apply – Relying again on its assertion that AT&T “knew or should have known” that the billing was improper, LEC-MI contends that the adverse interest exception to principal-agent liability applies because AT&T did not deal in good faith. This argument fails for the same reasons just identified – the Commission has said the billing disguised the true nature of the traffic, and the increase in volume on bills sent under LEC-MI's tariffs provided no indication Westphalia was acting against (instead of for) LEC-MI's interests in sending the bills.

AT&T Has Established Its Damages – LEC-MI asserts that AT&T has not proved its damages with “reasonable certainty.” However, LEC-MI does *not* challenge AT&T's damages methodology or calculations. Instead, the sole basis for LEC-MI's defense is that AT&T purportedly “admitted” some traffic was Voice over Internet Protocol (“VoIP”). Because, in LEC-MI's view, end office

charges apply to VoIP traffic (*but see AT&T Corp. v. FCC*, 841 F.3d 1047 (D.C. Cir. 2016)), LEC-MI says AT&T did not prove its damages with certainty because the alleged volume of VoIP traffic was not identified. However, among other problems, *see infra*, the entire premise of this argument is flawed: AT&T nowhere “admitted” any of the calls were VoIP; it merely acknowledged some calls may have “possibly” been VoIP (in the event LEC-MI attempted to establish that fact). However, LEC-MI has adduced no evidence that the traffic at issue was “VoIP-PSTN” within the meaning of the Commission’s rules (*see USF/ICC Transformation Order*, 26 FCC Rcd. 17663, ¶ 940 (2011)). To the contrary, LEC-MI admitted that the traffic and routing here was the same as at issue in the *Great Lakes Comnet Order* (¶ 14), which was all wireless traffic (*id.*; Answer ¶ 25). In all events, end office charges do not apply to over-the-top VoIP traffic, and if there were any VoIP traffic, it was clearly over-the-top VoIP rather than facilities-based VoIP.

ARGUMENTS

I. AT&T DID NOT RELEASE ITS CLAIMS AGAINST LEC-MI.

LEC-MI contends that AT&T released LEC-MI from liability for the refunds when AT&T executed a settlement agreement with Westphalia and GLC that granted those entities a general release – even though the release language explicitly carved out AT&T’s claims against LEC-MI from the scope of that release. *See* Formal Complaint, Ex. 6, Settlement Agreement, dated January 4, 2017, among AT&T, GLC and Westphalia ¶ 7 (“Settlement Agreement”) (ATT0000081-82) (“nothing herein releases ... (c) any claims by AT&T against . . . 123.Net, Inc. d/b/a Local Exchange Carriers of Michigan, notwithstanding GLC, WTC, [] or any other party billing AT&T on behalf of or as agent for such parties”).

LEC-MI’s argument rests upon a Michigan Supreme Court case that embraced a disfavored and widely superseded common law rule. LEC-MI Legal Analysis at 2-3 (arguing that that “a valid release of an agent for tortious conduct operates to bar recover against the principal on a theory of vicarious liability”) (quoting *Theophilis v. Lansing Gen. Hosp.*, 424 N.W.2d 478, 482 (Mich. 1988) (emphasis added)). LEC-MI’s single Michigan authority (even if it were valid) is simply inapplicable here, for a multitude of reasons.

First, LEC-MI's argument assumes that AT&T's only claim is a Section 201(b) claim that is akin to tort. That is not correct.

In addition to its Section 201(b) claim, AT&T has pleaded a Section 203 claim, which is a breach of tariff claim and thus is akin to a breach of contract claim. *See, e.g., Kutner v. Sprint Comm's Co., L.P.*, 971 F. Supp. 302, 306-07 (W.D. Tenn. 1997) ("Amended Tariff constitutes the contract between Plaintiff and Sprint").

It is undisputed that the "erroneously billed" end office access charges were billed to AT&T pursuant to LEC-MI's access tariff. As AT&T explained (and as LEC-MI admitted in 2014), LEC-MI's tariff (and the Commission's rules) prohibits end office charges on the aggregated 8YY traffic at issue. Formal Complaint ¶¶ 47-52. Specifically, LEC-MI's tariff states that it applies only to calls (i) made to or from end users of LECs that subtend the GLC tandem, and (ii) to or from an end user's "premises." The wireless 8YY aggregation traffic fails in both those respects. Formal Complaint ¶¶ 50-51. LEC-MI does not dispute or deny those points. The tariff also fails to describe the end office switching service to which LEC-MI's end office rates apply. *Id.* ¶ 52. In its Answer, LEC-MI contends that the label "local switching" is sufficient to describe the service to which its rates pertain. *Id.* The filed rate doctrine and the Commission's rules say otherwise.⁵ Tellingly, however, under LEC-MI's theory, the tariff could

⁵ *See* 47 C.F.R. § 61.2(a); *Great Lakes Commc'n Corp. v. AT&T Corp.*, 2015 WL 12551192, *21 (N.D. Iowa June 8, 2015) (granting summary judgment because a carrier's tariff did not adequately describe its services for which it sought to charge: "under the filed rate doctrine, a carrier must describe the services and the charges for those services in the tariff before billing for those services;" "the precise language of the tariff matters; the filed Tariff Doctrine binds carriers and customers to the tariff terms as stated, not to assumptions about intentions which customers might glean from the tariff"); *CoreTel Va., LLC v. Verizon Va., LLC*, 752 F.3d 364, 374 (4th Cir. 2014); *MCI WorldCom Network Servs. v. PaeTec Commc'ns, Inc.*, 204 Fed. Appx. 271, 271 n.2 (4th Cir. 2006) ("under the filed rate doctrine, a carrier is expressly prohibited from collecting charges for services that are not described in its tariff"); *AT&T Corp. v. YMax Commc'ns Corp.*, 26 FCC Rcd. 5742, ¶ 12 (2011) ("a carrier may lawfully assess tariffed charges only for those

have done the same for the “transport” and “tandem switching” rates, yet full descriptions were provided. GLC Tariff § 6.1.3. But even if LEC-MI were correct on the latter point, it offers no defense to its tariff violation on either of the first two grounds.

Under Section 203 (and under well-established Commission and court precedent applying the filed tariff doctrine),⁶ “no carrier shall [] charge, demand, collect or receive a greater...compensation” than the “charges specified” in the carrier’s tariff. 47 U.S.C. § 203. Thus, independent of any Section 201(b) claim, LEC-MI has violated Section 203 – indeed, the violation is conceded on two of the three grounds raised by AT&T – and LEC-MI is consequently liable under Section 206, for the “full amount of damages sustained in consequence” of its violation. 47 U.S.C. § 206. Even if LEC-MI’s release argument were otherwise valid (and, as explained below, it is not), the argument has no application whatsoever to AT&T’s Section 203 claim.

Second, LEC-MI’s argument assumes that AT&T’s Section 201(b) and Section 203 claims are based solely on “vicarious liability.” But while LEC-MI certainly is liable vicariously for the tortious actions of its agents under federal common law and ordinary common law agency principles, the nature of AT&T’s claims – particularly its Section 203 claim – and the billing

services specifically described in its applicable tariff”). LEC-MI also contends that AT&T is “estopped” from contesting the adequacy of the tariff in this regard because it had long paid the charges without protest. Answer ¶ 52. LEC-MI, however, fails to show that it may plead equitable defenses in a formal complaint proceeding. *AT&T Corp. v. All American Tel. Co.*, 30 FCC Rcd. 8959, ¶ 30 (2015), *aff’d in relevant part*, 867 F.3d 81 (D.C. Cir. 2017). Further, LEC-MI fails to show that it justifiably relied on AT&T’s payments. Lastly, this is essentially a voluntary payment argument, which the Commission has already rejected. *Great Lakes Comnet Order*, ¶ 37.

⁶ *AT&T Corp. v. YMax Commc’ns Corp.*, 26 FCC Rcd at 5748, ¶ 12; *Firstcom, Inc. v. Qwest Corp.*, 555 F.3d 669, 681 (8th Cir. 2009); *Fax Telecommunicaciones, Inc. v. AT&T*, 138 F.3d 479, 482 (2d Cir. 1997).

arrangements here demonstrate LEC-MI is also directly liable for the billing at issue under the Communications Act.

LEC-MI's defense is that, because Westphalia billed the charges to AT&T as LEC-MI's billing agent, this case involves a situation in which LEC-MI itself did not actually bill those charges to AT&T; consequently, LEC-MI is not the "primary wrongdoer" and thus did not itself commit violations of the Communications Act. *See, e.g.*, LEC-MI Legal Analysis t at 1, n.1; Answer ¶¶ 47-50 (denying "that it billed[] or is liable for any of Westphalia's erroneous end office billing charges to AT&T. LEC-MI admits only that, without LEC-MI's knowledge or consent, Westphalia billed AT&T certain tariffed charges that Westphalia ascribed to LEC-MI's OCN in connection with the access services that LEC-MI provided in the jointly provided access services to AT&T") (emphasis added).

LEC-MI's claim that all of the access billing at issue occurred "without [its] knowledge or consent" is unsubstantiated, and in fact contradicted by LEC-MI's prior representations and sworn testimony. In this regard, this is not a case in which a third party – which has no contractual or other arrangements with a common carrier – issues access charge bills to customers in the carrier's name wholly unbeknownst to the carrier. Quite the contrary, the undisputed facts are that (1) the end office charges were billed using LEC-MI's operating company number ("OCN") and were assessed pursuant to LEC-MI's tariff (which it issued in its name along with GLC and other carriers), Formal Complaint, Ex. 15, GLC Tariff Excerpts (ATT0000211), and (2) LEC-MI and GLC "entered into a Network Operating Agreement in 2003...under which GLC had billing responsibility for LEC-MI's interexchange traffic, which had been reflected in the parties' tariff since 2003." Formal Complaint, Ex. 5, LEC-MI Inf. Compl. Resp. at 2 (ATT0000069). LEC-MI also acknowledges that "GLC assigned the billing

responsibilities to WTC.” *Id.* Further, before the MPSC in 2014, LEC-MI’s CEO repeatedly conceded that, although he was not personally aware of the precise details of what was being billed on behalf of LEC-MI, he was fully aware that for years LEC-MI had used Westphalia/GLC as billing agents on the charges at issue, and that LEC-MI paid Westphalia/GLC a portion of the receipts to perform that service. MPSC Tr. at 527, 559, 574, 579. Westphalia’s preparation and transmittal of the bills in dispute are thus precisely what LEC-MI asked Westphalia to do.⁷

Consequently, on the facts here, and particularly with respect to AT&T’s Section 203 claim, LEC-MI is a “primary wrongdoer.” Indeed, a Section 203 claim concerns, *inter alia*, the failure to bill in accordance with a tariff, *i.e.*, to breach it. The tariff at issue is LEC-MI’s tariff, and it makes little sense to suggest that *Westphalia* breached LEC-MI’s tariff when Westphalia is not the issuer of that tariff. Rather, the only party that can breach LEC-MI’s tariff (in connection with bills issued thereunder) is LEC-MI. In short, LEC-MI filed an access tariff, authorized a billing agent to issue access bills on LEC-MI’s behalf pursuant to that tariff, and then AT&T and other customers were “erroneously billed” end office charges billed in LEC-MI’s name/OCN and assessed under LEC-MI’s tariff. Accordingly, LEC-MI breached its tariff, not Westphalia. AT&T’s Section 203 claim is properly viewed as a direct claim against LEC-MI.

In all events, Section 217 underscores that LEC-MI is liable for the overcharges of the end office charges at issue. As set forth in AT&T’s Formal Complaint, Section 217 of the Act states that “in construing and enforcing the provisions of this chapter, the act, omission, or failure

⁷ Particularly in light of Mr. Irvin’s testimony, LEC-MI does not, and could not properly, contend that GLC’s assignment of the billing responsibilities to its affiliate, Westphalia, bears on the issues here. AT&T thus refers to Westphalia herein as the billing agent LEC-MI retained for the purpose of billing AT&T access charges under LEC-MI’s tariff.

of any officer, agent, or other person acting for or employed by any common carrier or user, acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier or user as well as that of the person.” 47 U.S.C. § 217.

Westphalia’s acts unquestionably occurred within the scope of its employment.⁸ Section 217 thus establishes, by operation of law, that every act by Westphalia in sending AT&T the “erroneous[]” bills was also an act by LEC-MI, making LEC-MI liable under the Act.⁹

Lastly in this regard, the Commission has stated “Congress’s clear intent in enacting section 217 was to ensure that common carriers not flout their statutory duties by delegating them to third parties.” *In re Long Distance Direct, Inc.*, 15 FCC Rcd. 3297, ¶ 9 (2000). The Commission further stated that it was appropriate to hold a principal liable for an agent’s violation of a statute under the “long-established principles of common law holding statutory duties to be non-delegable.”¹⁰ *Id.* ¶ 9, n.12. In the “slamming” context, the Commission, based on Section 217, has repeatedly held common carriers “responsible for the acts and omissions of

⁸ See, e.g., *Gleason v. Seaboard Air Line, Ry. Co.*, 278 U.S. 349, 352-53, 357-58 (1929) (agent providing customer with false notification of merchandise arrival to effect agent’s fraud acted within scope of employment, which expressly included notifying customers when merchandise arrived); see also *infra* pp. 14-19.

⁹ In deeming the acts and omissions of an agent to be those of a common carrier, Section 217 differs from *respondeat superior* and other common law forms of vicarious liability, which are typically framed as establishing, for policy reasons, that a principal is “subject to liability for torts committed by employees.” Restatement (Third) Agency, § 2.04 (2006) (emphasis added); see also *id.* § 2.04 cmt. b (“[R]espondeat superior is a basis upon which the legal consequences of one person’s acts may be attributed to another person”) (emphasis added). Courts have sometimes referred, in dicta, to Section 217 as a codification of vicarious liability principles. *Chavrat v. EchoStar Satellite, LLC*, 630 F.3d 459, 465 (6th Cir. 2010) (stating Section 217 establishes “a form of vicarious liability applicable only to ‘common carrier[s] or user[s]’”) (emphasis added). Research revealed no case addressing whether Section 217 imposes direct, as opposed to vicarious, liability on principals for the actions of agents. But, as explained, the plain language of Section 217 indicates it imposes direct liability on common carriers.

¹⁰ None of LEC-MI’s precedent involves a statutory duty. See LEC-MI Legal Analysis at 6-9.

their employees and independent contractors, and consistently refuse[s] to excuse [common carriers] from forfeiture penalties where actions of employees or independent contractors have resulted in violations.” *In re Silv Comm’ns Inc.*, 25 FCC Rcd. 5178, 5180 ¶ 5 n.18 (2010); *see also Vista Servs. Corp.*, 15 FCC Rcd. 20646, 20650 ¶ 9; *Long Distance Direct*, 15 FCC Rcd. 3297 at 3300-01 ¶ 9. LEC-MI, too, should not escape liability for violating the Communications Act simply because it chose to bill through an agent.

Third, LEC-MI’s argument assumes that, with respect to a release of LEC-MI’s vicarious liability under Section 201(b) for Westphalia’s tortious actions, Michigan law governs. LEC-MI is again incorrect – federal law applies, and under federal law the scope of a release is determined by the intent of the parties. Thus, even if the Commission looked solely at LEC-MI’s vicarious liability under a tort-based claim (Section 201(b)), LEC-MI’s defense which is based entirely on Michigan law should still be rejected.

The Commission typically looks to federal law to determine whether a principal is vicariously liable for its agent’s statutory tort. *In re Dish Network, LLC*, 28 FCC Rcd. 6574, 6584 ¶ 29 (2013) (“Federal statutory tort actions...typically are construed to incorporate federal common law agency principles of vicarious liability where...the language of the statute permits such a construction and doing so would advance statutory purposes”) (citing cases). Federal law therefore governs the impact of a release of vicarious liability for federal statutory causes of action. *E.g., Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 344-45 (1971); *Avery v. United States*, 829 F.2d 817, 819 (9th Cir. 1987). Indeed, the Act expressly provides in Section 217, discussed above, that a *federal* law standard determines the liability of common carriers. 47 U.S.C. § 217.

Federal law does not support LEC-MI's position as to the release at issue. The Supreme Court has "expressly repudiated" the "ancient common-law rule" that "a release of one joint tortfeasor released all other parties jointly liable" with respect to federal statutory actions, *Zenith*, 401 U.S. at 343, in favor of a "straightforward rule []that a party releases only those other parties whom he intends to release," *id.* at 347. *See also Ruskay v. Waddell*, 552 F.2d 392, 395 (2d Cir. 1977) ("In construing the scope of [a settlement] release, we are to give effect to the intent of the parties"); Restatement (Third) Of Agency § 7.04, Reporter's Notes (c) (2006) ("[r]eleasing an agent from liability may not always release the principal as well"). As LEC-MI acknowledges, the plain language of the release of AT&T's claims against GLC and Westphalia explicitly excludes AT&T's claims against LEC-MI from the scope of the release:

[N]othing herein releases ... (c) any claims by AT&T against parties other than the Debtor Release Parties, including, without limitation, 123.Net, Inc. d/b/a Local Exchange Carriers of Michigan, notwithstanding GLC, WTC, WBI or any other party billing AT&T on behalf of or as agent for such parties.

Formal Complaint, Ex. 6, Settlement Agreement, dated January 4, 2017, among AT&T, GLC and Westphalia ¶ 7 ("Settlement Agreement") (ATT0000081-82). Thus, because the parties to the release plainly did not intend for AT&T to release its claims against LEC-MI, that release did not impact AT&T's claims against LEC-MI under applicable federal law, *i.e.*, Sections 201, 203, and 217.

Two strong policy points support applying a federal common law rule that interprets the scope of a release with respect to Communications Act claims based on the parties' expressed intent. One, applying federal common law provides a consistent rule for all Communications Act claims. *West Virginia v. United States*, 479 U.S. 305, 308-09 (1950); *AT&T v. New York City*, 736 F. Supp. 496 (S.D.N.Y. 1996). Indeed, it is not clear that the Commission has authority to apply different state common law precedents regarding the scope of releases. *Cf.*

All-Am. Tel. Co. v. FCC, 867 F.3d 81, 92 (D.C. Cir. 2017) (holding that a “state common law claim, by definition, does not arise under or state a violation of the Communications Act, and thus falls outside the scope of the Commission’s jurisdiction”). Two, if parties cannot preserve claims against third parties by excluding them from a release, that will have a chilling effect on settlement in contravention of the Commission’s long-standing policy of encouraging settlement. *B&D v. Baldwin Cty. Membership Corp.*, 4 FCC Rcd. 7597, ¶ 3 (1989) (Commission encourages settlement of formal complaint disputes); *Theophelis v. Lansing Gen. Hosp.*, 424 N.W.2d 478, 508 (Mich. 1988) (explaining that the rule LEC-MI urges the Commission to adopt will “deter the parties from settling because they would risk losing other claims necessary to obtain full compensation”).

Fourth, even assuming, *arguendo*, that state common law could be applied in this case in lieu of federal law, , Michigan law would not be the applicable law. Section 19 of the AT&T-GLC/Westphalia Settlement Agreement states: “This Agreement shall be construed in accordance with and be governed by the law of the State of New York not including its choice of law principles.” Formal Complaint, Ex. 6, Settlement Agreement ¶ 19 (ATT0000084). Accordingly, if any state law were applicable, New York law, rather than Michigan law, would apply.¹¹ New York law, like the federal law discussed above, provides that a “release, like any

¹¹ Consistent with the federal case law, discussed above, giving primacy to the parties’ intent for federal statutory claims, contractual choice of law provisions are generally given effect. *See Delhomme Indus., Inc. v. Houston Beechcraft, Inc.*, 669 F.2d 1049, 1058 (5th Cir. 1982) (“A choice of law provision in a contract is presumed valid until it is proved invalid”); *Robert A. Hansen Family Tr. v. FGH Indus., LLC*, 760 N.W.2d 526, 532 (Mich. Ct. App. 2008) (“It is undisputed that Michigan’s public policy favors the enforcement of contractual . . . choice-of-law provisions”); Restatement (Second) of Conflict of Laws §§ 170 (“Release or Covenant Not to Sue” as applied to joint tortfeasors), 187 (applying choice of law provision in breach of contract claims) & comment e (“Prime objectives of contract law are to protect the justified expectations of the parties and to make it possible for them to foretell with accuracy what will be their rights and liabilities under the contract. These objectives may best be attained in multistate

other contractual provision, must be construed in accordance with the intent of the parties who executed it.” *Skylon Corp. v. Guilford Mills, Inc.*, 901 F. Supp. 711, 713 (S.D.N.Y. 1995). Consistent therewith, a New York statute provides that a release granted to one of several persons “liable...in tort for the same injury [] does not discharge any of the other tortfeasors from liability for the injury...unless its terms expressly so provide.” N.Y. Gen. Oblig. § 15-108; *see also Tufail v. Hionas*, 549 N.Y.S.2d 436, 437 (N.Y. App. Div. 1989) (stating that Section 15-108 applies whether the tortfeasors are “joint, successive or vicarious”).¹² Indeed, even prior to the enactment of Section 15-108 in 1972, New York law did not deem the release of an agent to bar claims against the principal “where a releasor has reserved his right to proceed against the other party.” *Smith v. Lincoln*, 275 N.Y.S.2d 74, 76 (N.Y. Trial Term 1966).

For each of the independent reasons set forth above, AT&T did not release its claims against LEC-MI when it released Westphalia and GLC, but rather expressly reserved the right to pursue its claims against LEC-MI.

II. WESTPHALIA HAD APPARENT AUTHORITY TO BILL AT&T THE CHARGES IN DISPUTE – WHAT AT&T KNEW OR SHOULD HAVE KNOWN ABOUT THE IMPROPER BILLING IS IRRELEVANT.

LEC-MI raises the defense that Westphalia did not have apparent authority to issue the access invoices at issue. LEC-MI Legal Analysis at 6. According to LEC-MI, Westphalia billed AT&T “*without LEC-MI’s knowledge* or consent,” Answer ¶ 2 (emphasis added), yet somehow AT&T “knew or should have known” that the invoices at issue contained improper, non-access chargeable traffic. *Id.* at 10. Thus, according to LEC-MI, because AT&T allegedly knew more

transactions by letting the parties choose the law to govern the validity of the contract and the rights created thereby”).

¹² New York law thus differs from Michigan law on the critical point at issue in the *Theophelis* decision relied upon by LEC-MI – the release of an agent does not operate to bar claims against a principal that faces only vicarious (as opposed to joint) liability.

than LEC-MI did about LEC-MI's own bills, AT&T should have been aware that Westphalia did not have authority to issue the bills. This is nonsense, and LEC-MI's defense should be flatly rejected.

To begin with, LEC-MI's defense is barred because it contradicts its admission that AT&T was "erroneously billed" and should be issued credits. *See supra* pp. 1-2. It is also barred because the Commission has already addressed the issue of what could be gleaned from the invoices at issue, stating: "AT&T *did not know* that (1) [GLC and Westphalia] billed for CLEC access services in a manner that reflected incorrectly that an ILEC was providing them, and (2) [Westphalia] billed on behalf of LEC-MI end offices switching on wireless calls, which had the effect of disguising the nature of the Defendants' arrangements and charges." *Great Lakes Comnet Order*, ¶ 36, n.125 (emphasis added). LEC-MI provides no basis to revisit the issue at this date. Notably, other major long distance carriers also did not discover the improper billing until approximately the same time as AT&T, which further undercuts LEC-MI's claim that AT&T should have taken action earlier. Formal Complaint, Ex. 4, IXC Informal Complaint (ATT-0000049 to ATT-0000066).¹³

In all events, LEC-MI's position is a non-sequitur. With respect to LEC-MI's vicarious liability, the issue is whether Westphalia had authority – apparent authority – to issue the invoices in dispute on behalf of LEC-MI. But the knowledge LEC-MI claims AT&T has – that the invoices at issue reflected a large increase in traffic volume – does not bear on that issue. As an initial matter, sharp increases in traffic can be associated with legitimate activities, and thus does not automatically indicate the billing is improper. But even assuming *arguendo* that AT&T

¹³ Further, as explained above, and particularly with respect to AT&T's Section 203 claim, LEC-MI has direct liability – which does not implicate apparent authority – for the amounts in dispute. *See supra* pp. 9-10.

“should have known” that the invoices contained improper charges, that knowledge would give AT&T absolutely no insight into the relevant issue, which is the relationship between Westphalia and LEC-MI, *i.e.*, whether in billing the improper charges Westphalia was acting against LEC-MI’s wishes, as opposed to carrying out LEC-MI’s wishes.

Further, in this respect, LEC-MI does not – and cannot – deny that Westphalia had authority to bill AT&T for access services under LEC-MI’s tariff, and had long done so. Nor does LEC-MI deny that the invoices in dispute were proper in form and were conveyed by Westphalia in the same way that it had sent all previous invoices that did not contain improper traffic. LEC-MI also does not deny AT&T paid the amounts billed – including the larger bills as the 8YY aggregation scheme intensified – without LEC-MI ever raising an objection or concern. LEC-MI cannot point to anything during the relevant period that would tip AT&T off to Westphalia acting against LEC-MI’s interests.¹⁴

In an analogous context, courts have found that a corporate credit card holder that continued to pay statements that contained improper personal charges associated with an unauthorized employee card user cloaked that employee with apparent authority to use the card for the improper personal charges. *See, e.g., DBI Architects, P.C. v. Am. Express Travel-Related Servs. Co.*, 388 F.3d 886, 889, 893-94 (D.C. Cir. 2004); *Minskoff v. Am. Express Travel-Related Servs. Co.*, 98 F.3d 703, 709-10 (2d Cir. 1996). Likewise here, AT&T paid the invoices Westphalia issued under LEC-MI’s tariff, including during the year-and-a-half period in which

¹⁴ In fact, AT&T has acknowledged that some of the charges on the Westphalia invoices were legitimate, and deducted those from its damages calculation (Formal Complaint ¶¶ 54-56), and LEC-MI stands willing to receive the benefit of Westphalia’s billing efforts in that respect.

the invoices contained the improper charges, without protest, complaint or any indication of dissent from LEC-MI.¹⁵ Westphalia thus had apparent authority to issue the improper bills.

LEC-MI's cited authority is not to the contrary. Indeed, LEC-MI's cases undercut its argument because they demonstrate the scenarios that lead courts to find apparent authority lacking differ starkly from this case. For instance, in *Permobil, Inc. v. Am. Express Travel Related Servs. Co.*, the court considered whether American Express could rely on the apparent authority of an employee who had fraudulently obtained and used a corporate credit card. 571 F. Supp.2d 825, 833-35 (M.D. Tenn. 2008). The court declined to dismiss the case, finding there was a fact issue as to whether the nature of the charges on their face raised concerns about their propriety. The charges the employee wrongdoer (and her husband) placed on the corporate card included: "fireworks worth \$27,000, jet skis worth \$25,000, children's clothing, an airline ticket in the name of [the husband], gift cards and sporting goods worth over \$11,500." *Id.* at 834. Those items were of a type obviously not associated with the employer's business, and thus patently suggested the employee was using the card for personal use.

Similarly, in *Gen. Overseas Films, Ltd. v. Robin Int'l, Inc.*, the issue concerned the apparent authority of the vice-president and treasurer of a large company (Anaconda) to issue a guarantee to an unrelated third party. 542 F. Supp. 684, 687-89 (S.D.N.Y. 1982). While acknowledging Anaconda had held its treasurer out as having a broad range of authority regarding the financial affairs of the company, the court found three critical facts undercut the treasurer's apparent authority for the guarantee at issue: (i) the third party had no prior relationship with Anaconda, and was not a bank or other type of entity with which Anaconda

¹⁵ Even if LEC-MI did not raise any concerns about the invoices because it was unaware that the invoices were improper (a point AT&T does not concede), that is irrelevant to Westphalia's apparent authority, which is viewed from the perspective of the third party, *i.e.*, AT&T.

regularly conducted business; (ii) the treasurer's authority described in the bylaws and other documents was restricted to transactions (such as bank borrowings by Anaconda itself) in which Anaconda had a direct interest; and (iii) although treasurer had authority to sign "evidences of indebtedness," established New York law, and custom in the industry, provided that a guarantee issued to a third party is not an "evidence of indebtedness." *Id.* at 690-91.

In contrast to those cases, the invoices here were for access charges billed under LEC-MI's tariff – precisely the type of invoices LEC-MI admittedly engaged Westphalia to produce. The only alleged irregularity in the invoices noted by LEC-MI was a sharp increase in the billed volumes, but there are undoubtedly legitimate reasons for traffic volumes to increase, and it is undisputed that the bills still reflected the access traffic Westphalia was hired to bill. LEC-MI does not, and could not, contend that anything in the invoices could give rise to a suspicion suggesting that Westphalia was billing AT&T charges under LEC-MI's name without LEC-MI's knowledge, or intended to keep the payment for itself. *Cf., e.g. Permobil*, 571 F. Supp.2d at 833-35 (fact issue as to whether charges, on a corporate charge card, for fireworks and jet skis were on their face improper when charged by an employee).

Also, and again assuming *arguendo* a volume increase could suffice to raise suspicions of wrongdoing, those suspicions naturally pointed to LEC-MI, as a carrier whose charges had increased, and not Westphalia (the mere billing agent from AT&T's perspective). In this regard, the assertion of LEC-MI's expert that AT&T has long been particularly attuned to, and active in opposing, improper CLEC access charge schemes (if true) actually undercuts LEC-MI's position. A strong focus on CLEC fraud suggests that AT&T would suspect LEC-MI, a CLEC,

orchestrated the scheme, and not that Westphalia – an ILEC that served as LEC-MI’s billing agent – acted independently without LEC-MI’s knowledge or consent.¹⁶

LEC-MI’s argument that the spike in traffic erased Westphalia’s apparent authority is baseless for the reasons just explained, but is also ironic. If LEC-MI’s position were accepted, carriers receiving bills from agents would need to withhold payment at the first sign of any billing anomaly or error, or risk being unable to recover from the principal – precisely the so-called “self-help” some CLECs such as LEC-MI have long decried.

In sum, it is undisputed that: (i) throughout the entire relevant period (and well before), LEC-MI engaged Westphalia to bill access charges on LEC-MI’s behalf under LEC-MI’s tariff; (ii) Westphalia sent the electronic invoices at issue, which reflected end office charges billed under LEC-MI’s tariff and OCN; and (iii) AT&T paid all of the end office charges on the invoices issued by Westphalia, from before the scheme began and for over a year-and-a-half after the inflated charges commenced, without any concern raised by LEC-MI. Westphalia thus had apparent authority to bill all of the charges at issue on LEC-MI’s behalf. Accordingly, LEC-MI’s defense should be rejected. Further, the extensive discovery sought on, and expert opinion directed to, what AT&T knew or should have known about the improper billing is a massive sideshow that should be disregarded.¹⁷

¹⁶ To the extent LEC-MI suggests that AT&T could somehow forfeit its claims by continuing to make payments on the invoices after possible irregularities became known, that is akin to the voluntary payment doctrine argument that the Commission correctly rejected, *inter alia*, because it is inapplicable to claims under the Communications Act. *Great Lakes Comnet Order*, ¶ 37.

¹⁷ If discovery (or expert testimony) regarding what AT&T knew or should have known about the propriety of the invoices in dispute was relevant and proper – and it is not – then there should also be discovery into all of LEC-MI’s relationships and dealings with Westphalia and GLC to determine the nature and full extent of LEC-MI’s involvement in, and knowledge of, the scheme. That information could provide additional avenues to establish LEC-MI’s direct liability, *e.g.*, if LEC-MI knowingly engaged in the scheme, or if LEC-MI negligently or recklessly selected or supervised its agents, Westphalia and GLC. But because LEC-MI’s liability has already been

III. THE ADVERSE INTEREST EXCEPTION TO PRINCIPAL LIABILITY FOR AN AGENT'S ACTIONS DOES NOT APPLY.

LEC-MI argues that the “adverse interest exception” to principal liability applies here because (per LEC-MI’s allegations) Westphalia acted solely in its own interest and against LEC-MI’s interests by engaging in fraud and not relaying all of AT&T’s overpayments to LEC-MI. LEC-MI Legal Analysis at 11-12. In its Formal Complaint, AT&T demonstrated that, even assuming, *arguendo*, that the adverse interest exception applies under the Communications Act, the exception does not apply in this instance, because AT&T was a third party. *See* Formal Complaint ¶¶ 94-100. In addition to the authorities cited in the Formal Complaint, under long-standing Supreme Court precedent, “[w]hen an agent who is authorized to make a contract on his principal’s behalf [whether as employee or agent] uses fraud to induce the contract, the principal is liable even if the agent is acting solely to feather his own nest.” *Ackerman v. Nw. Mut. Life Ins. Co.*, 172 F.3d 467, 471 (7th Cir. 1999) (explaining “[t]his is the doctrine of *Gleason v. Seaboard Air Line Ry.*,” 278 U.S. 449 (1929)) (emphasis added); *see also Aetna Life Ins. v. Carr*, 2010 WL 5476783, *2 (N.D. Ill. 2010); *Am. Soc’y Of Mech. Eng’rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 566 (1982). The *Gleason* line of authority, which focuses on contractual and billing arrangements like that between LEC-MI and Westphalia, further cements the conclusion that the adverse interest exception has no application here.

LEC-MI does not challenge AT&T’s authority. Instead, it seizes upon language from the Restatement that a third party must deal “in good faith,” and that a third party “who knows or has reason to know that an agent acts adversely to the principal, and who deals with the principal

established (indeed, admitted) in AT&T’s Formal Complaint and reply, the Commission should reject LEC-MI’s invitation to waste the Commission’s and the parties’ resources on such a frolic and detour.

through the agent, has not dealt in good faith.” LEC-MI Legal Analysis at 12 (citing Restatement (Third) of Agency § 5.04(a), cmt. b). As LEC-MI acknowledges (*id.* at 11), this largely reiterates LEC-MI’s apparent authority argument. It therefore fails for the same reasons. As explained above, the Commission has already stated that the billing disguised the true nature of the traffic. The large increase in traffic volume that in early 2012 appeared on the access invoices Westphalia sent to AT&T under LEC-MI’s tariff did not automatically signal anything improper – and to the extent the volume increase might have indicated improper billing, LEC-MI points to nothing that even suggested Westphalia was acting to collect the improper charges solely for itself, and not for LEC-MI too.

Lastly, LEC-MI offers a policy argument, contending “AT&T was in the superior position to detect the fraud here and to withhold payment,” and therefore AT&T must “bear the burden of the real wrongdoer here, Westphalia.” LEC-MI Legal Analysis at 13 (emphasis added). That is absurd – and the Commission has already rejected a similar argument, *Great Lakes Comnet*, ¶¶ 36-37. Equally as fundamental, LEC-MI was not a stranger either to the billing of access charges to AT&T, or the 8YY aggregation scenario. LEC-MI engaged Westphalia under a written agreement to bill AT&T access charges under LEC-MI’s tariff. Formal Complaint, Ex. 5, LEC-MI Inf. Compl. Resp. at 2 (ATT0000069 (describing 2003 Network Operating Agreement)). LEC-MI stated in its Response to AT&T’s Informal Complaint that it “directed” Westphalia to issue credits and take certain other actions. *Id.* at 5 (ATT0000072). This belies LEC-MI’s assertion that it was “in no way situated to monitor the billing that GLC delegated to Westphalia.” LEC-MI Legal Analysis at 12. If nothing else, LEC-MI could simply have asked Westphalia to convey the relevant billing information. LEC-MI claims that Westphalia “did not even respond to LEC-MI’s request for billing information” (*id.*),

but that request came *after* the 8YY aggregation scheme was uncovered. Formal Complaint, Ex. 5, LEC-MI Inf. Compl. Resp. at 4 (ATT0000071). If LEC-MI had made such a request during the period in dispute and was refused, that would have signaled to LEC-MI something was amiss. But LEC-MI apparently made no such requests. Additionally, if LEC-MI truly was “innocent” like it claims, LEC-MI has acknowledged it could have sought recovery from Westphalia and GLC (Complaint, Ex. 5, LEC-MI Infl. Compl. Resp. at 6 (ATT-0000073)), but apparently declined to do that too. LEC-MI cannot invoke its own inaction to deny AT&T the remedy it deserves. Finally, LEC-MI was plainly aware of the arrangements that facilitated the 8YY wireless aggregation that began in 2009-2010 (MSPC Tr. 528-29) – whereas IXC’s were not, at least until much later in 2013 and 2014 (*Great Lakes Comnet*, ¶¶ 36-37).

In short, contrary to LEC-MI’s naked rhetoric, this indeed is an “ordinary principal-agent situation.” LEC-MI Legal Analysis at 12. LEC-MI is liable for its agent’s violations of the Communications Act.

IV. AT&T HAS PROPERLY ESTABLISHED ITS DAMAGES.

In its Formal Complaint, AT&T noted that it lacked the records necessary for an exact calculation of the refunds LEC-MI owes, but explained its conservative method for ascertaining the refund amounts, plus applicable interest. Formal Complaint ¶¶ 53-57 (AT&T used average volumes of LEC-MI traffic experienced for 6 months prior to sharp increase in February 2012 as a baseline, and deemed all minutes above that baseline to be improper 8YY aggregation traffic). AT&T therefore determined that LEC-MI owed \$1,054,897 in refunds, plus \$628,467 in interest under LEC-MI’s tariff rate through May 2015, when LEC-MI agreed to a stay of proceedings (AT&T seeks additional interest for the period after mediation efforts concluded in June 2019, in an amount to be determined). *Id.* ¶¶ 57-58. AT&T has thus met the Commission’s requirement to show damages with “reasonable certainty and by the best means possible under the

circumstances.” *In re Commc’ns Satellite Corp.*, 97 F.C.C.2d 82, 91 ¶ 26 (Feb. 2, 1984) (“damages need not be established with precise mathematical accuracy”); *see also Palmer v. Conn. Ry. & Lighting Co.*, 311 U.S. 544, 561 (1941) (contract damages need only provide a “basis for a reasoned conclusion”).

LEC-MI does not in any way challenge AT&T’s damages methodology or the associated calculations.¹⁸ LEC-MI’s only challenge to AT&T’s damages is a contention that AT&T “admits that the traffic in question is a mix of wireless and VoIP traffic,” and having “undertaken no effort to differentiate between wireless and VoIP-originated traffic,” AT&T’s “claimed damages cannot be proven to a reasonable degree of certainty.” LEC-MI Legal Analysis at 13-14. LEC-MI is wrong on the facts and the law.

As an initial matter, AT&T has not “admitted” any of the traffic is VoIP. Rather, acknowledging that there could be assertions that the traffic at issue might have included VoIP calls, AT&T simply noted at various points that the traffic “was originated by customers of wireless services (or, potentially, VoIP providers).” Formal Complaint ¶ 26 (emphasis added); *see also id.* ¶¶ 50 (originating end users “were not end user customers of LEC-MI, but rather were customers of wireless (or possibly VoIP) carriers”) (emphasis added). Acknowledging the possibility that the traffic included VoIP calls is not an *admission* that any of the calls were in fact VoIP. Accordingly, absent evidence adduced by LEC-MI that the calls were VoIP – of which there is none – the record contains nothing to indicate that any of the calls were VoIP. *See*

¹⁸ LEC-MI denied AT&T’s pleading to that effect in its Answer. Answer ¶¶ 53-57. But that general denial is insufficient under the Commission’s rules to constitute a challenge to AT&T’s damages evidence. 47 C.F.R. § 1.721(d).

47 C.F.R. §§ 1.726(b); 1.721(d) (“Averred facts, claims, or defenses ... must be supported by relevant evidence”).¹⁹

Further to this point, the Westphalia and GLC proceedings were litigated on the basis that all of the traffic at issue was wireless, *Great Lakes Comnet Order*, ¶ 14, and LEC-MI has acknowledged that the traffic and routing at issue here is the same as in Westphalia and GLC, Answer ¶ 25; *see also* Formal Complaint, at 567-568 (ATT-0000428 to ATT-0000429) (LEC-MI’s Dan Irvin indicating that the traffic at issue was wireless). Accordingly, because the record in Westphalia and GLC is part of the record here, and LEC-MI has introduced no contrary evidence, the record as it stands establishes all of the calls at issue were wireless.

Finally, even if some calls were VoIP, end office charges still could not properly be assessed on those calls. As AT&T explained in its Formal Complaint, all the calls at issue – even VoIP calls (if they exist) – were originated by end users other than LEC-MI end users, and for that reason alone end office charges cannot be assessed on those calls. Formal Complaint ¶ 50. LEC-MI could challenge AT&T’s damages only if it adduced evidence that some number of the calls at issue were VoIP calls originated by LEC-MI’s own end users (or end users of retail VoIP partners of LEC-MI).²⁰ With such evidence absent, LEC-MI has not mounted a credible challenge to AT&T’s damages position.

¹⁹ Certainly, speculation that some of the traffic might be VoIP does not indicate that a material amount of traffic was VoIP such that one could fairly conclude AT&T did not establish its damages to a “reasonable certainty.”

²⁰ AT&T also contests LEC-MI’s underlying assumption that any “over-the-top” VoIP calls can properly be assessed access charges (even if the end user is a customer of LEC-MI or a VoIP partner). Although the D.C. Circuit remanded the case to the Commission, the court’s decision eliminated the only basis for the Commission’s conclusion that switching over-the-top VoIP calls was the “functional equivalent” of end office switching. *AT&T Corp. v. FCC*, 841 F.3d 1047, 1049 (D.C. Cir. 2016), *vacating In re Connect America Fund*, 30 FCC Rcd. 1587 (2015). AT&T therefore maintains that, unless and until the Commission takes further action, end office charges cannot be assessed on over-the-top VoIP calls. *See OI Commc’ns v. AT&T Corp.*, 2017 WL

V. THE ENTIRETY OF AT&T'S CLAIMS FALLS WITHIN THE STATUTE OF LIMITATIONS.

LEC-MI contends that the earliest two months of traffic for which AT&T seeks a refund, February and March 2012, fall outside of the two-year statute of limitations (based upon AT&T's April 2014 Informal Complaint), and should be removed from AT&T's damages. LEC-MI Legal Analysis at 14. In advancing that position, LEC-MI's ignores AT&T's explanation on this issue in its Formal Complaint. Briefly recapped, the statute of limitations does not begin to run until the cause of action accrues. 47 U.S.C. § 415(c). A cause of action under the Communications Act accrues when the injured party "discovers (or with due diligence should discover) that it has been overcharged." *MCI Telecomms. Corp. v. FCC*, 59 F.3d 1407, 1416 (D.C. Cir. 1995). Because the true nature of the charges was disguised by the billing, *Great Lakes Comnet Order*, ¶ 36, n.125; *id.* ¶ 37, AT&T did not, and could not have, discovered it was overcharged until July 2013 – and thus February and March 2012 are within the two-year statute of limitations.²¹

8294245 (N.D. Cal. Dec. 18, 2017) ("The services provided by [a LEC] in conjunction with over-the-top voice-over-IP providers are not end office access services, as those services are defined by current FCC policy.").

²¹ LEC-MI offers speculation from its expert that AT&T should have known about the 8YY aggregation activities as early as May 2010. LEC-MI Legal Analysis at 14. The Commission's determination that the billing disguised the 8YY aggregation activities forecloses that effort.

Respectfully submitted,

/s/ Brian A. McAleenan

Christi Shewman
Gary L. Phillips
David L. Lawson
AT&T SERVICES, INC
1120 20th Street, N.W.
Washington, D.C. 20036
202-457-3090

Brian A. McAleenan
SIDLEY AUSTIN LLP
One South Dearborn
Chicago, IL 60603
(312) 853-7000
(312) 853-7036 (fax)

Michael J. Hunseder
Marc A. Korman
SIDLEY AUSTIN LLP
1501 K Street NW
Washington, DC 20005
mhunseder@sidley.com
(202) 736-8000
(202) 736-8711 (fax)

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Counsel for AT&T Services, Inc. and AT&T Corp.